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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 STEVEN FLOYD VOSS,
10 Petitioner,
11 vs.
12 ISIDRO BACA, et al.,
13 Respondents.

Case No. 3:15-cv-00183-HDM-VPC
ORDER

14
15 Before the court are the amended petition for a writ of habeas corpus pursuant to 28 U.S.C.
16 § 2254 (ECF No. 12), respondents' motion to dismiss (ECF No. 15), petitioner's opposition (ECF
17 No. 17), and respondents' reply (ECF No. 18). The court finds that this action is untimely, and the
18 court grants respondents' motion.

19 A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a
20 person in custody pursuant to the judgment of a State court. The limitation period shall run
from the latest of—
21 (A) the date on which the judgment became final by the conclusion of direct review or the
expiration of the time for seeking such review;
22 (B) the date on which the impediment to filing an application created by State action in
violation of the Constitution or laws of the United States is removed, if the applicant was
23 prevented from filing by such State action;
24 (C) the date on which the constitutional right asserted was initially recognized by the
Supreme Court, if the right has been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or
25 (D) the date on which the factual predicate of the claim or claims presented could have been
discovered through the exercise of due diligence.

26 28 U.S.C. § 2244(d)(1). If the judgment is appealed, then it becomes final when the Supreme Court
27 of the United States denies a petition for a writ of certiorari or when the time to petition for a writ of
28 certiorari expires. Jimenez v. Quarterman, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R.

1 13(1). Any time spent pursuing a properly filed application for state post-conviction review or other
 2 collateral review does not count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2).
 3 The period of limitation resumes when the post-conviction judgment becomes final upon issuance
 4 of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). An untimely state
 5 post-conviction petition is not “properly filed” and does not toll the period of limitation. Pace v.
 6 DiGuglielmo, 544 U.S. 408, 417 (2005). A prior federal habeas corpus petition does not toll the
 7 period of limitation. Duncan v. Walker, 533 U.S. 167, 181-82 (2001). Section 2244(d) is subject to
 8 equitable tolling. Holland v. Florida, 560 U.S. 631, 645 (2010). “[A] ‘petitioner’ is ‘entitled to
 9 equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that
 10 some extraordinary circumstance stood in his way’ and prevented timely filing.” Id. at 649 (quoting
 11 Pace, 544 U.S. at 418). The petitioner effectively files a federal petition when he delivers it to
 12 prison officials to be forwarded to the clerk of the court. Rule 3(d), Rules Governing Section 2254
 13 Cases in the United States District Courts.

14 Petitioner challenges his custody pursuant to the judgment of conviction of the Second
 15 Judicial District Court of the State of Nevada, case number CR97-2077. Petitioner filed a habeas
 16 corpus petition challenging the same judgment of conviction in Voss v. Cox, case number 3:11-cv-
 17 00223-LRH-WGC (“Voss I”). The petition in that action was partially unexhausted, and petitioner
 18 dismissed the action. Respondents’ exhibits filed in Voss I are more extensive than respondents’
 19 exhibits filed in this action. When necessary, the court will cite to exhibits filed in Voss I as such,
 20 and the electronic case filing docket numbers in those citations will be for that action. Furthermore,
 21 respondents’ exhibits in Voss I are designated numerically, and respondents’ exhibits in this action
 22 are designated alphabetically.¹

23 In CR97-2077, on July 8, 1998, petitioner was convicted of first-degree murder with the use
 24 of a deadly weapon and first-degree kidnaping. Voss I, Ex. 57 (ECF No. 29-2). Petitioner appealed.
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26 ¹Petitioner has attached extensive exhibits to his amended petition (ECF No. 12). However,
 27 they and the amended petition were docketed into the electronic filing system all as one document
 28 three hundred twenty-nine (329) pages long. Citation to petitioner’s exhibits would be unwieldy
 and, in light of the exhibits filed in Voss I, unnecessary.

1 On May 24, 2000, the Nevada Supreme Court held that evidence was insufficient for the deadly-
 2 weapon enhancement, and it affirmed the judgment of conviction on all other grounds. Voss I, Ex.
 3 71 (ECF No. 29-16). The state district court entered its amended judgment of conviction on July 13,
 4 2000. Voss I, Ex. 76 (ECF No. 29-21). The time to petition the Supreme Court for a writ of
 5 certiorari expired on August 22, 2000, based upon the date of the Nevada Supreme Court's decision,
 6 not the entry of the amended judgment.²

7 Forty-eight (48) days later, on October 9, 2000, petitioner filed his first post-conviction
 8 habeas corpus petition in state district court, case number CR97P2077. Voss I, Ex. 77 (ECF No. 29-
 9 22). The state district court denied the petition on June 5, 2009. Ex. B (ECF No. 16-2). Petitioner
 10 appealed. The Nevada Supreme Court decided the appeal on September 29, 2010. Ex. C (ECF No.
 11 16-3). Remittitur issued on March 21, 2011. Ex. D (ECF No. 16-4). The first state post-conviction
 12 habeas corpus petition tolled the one-year period under 28 U.S.C. § 2244(d)(2) while it was
 13 pending.

14 Thirty-one (31) days later, on April 21, 2011, petitioner filed in the state district court a
 15 motion to correct clerical mistakes, to correct or modify verdict and judgment, or vacate judgment.
 16 Ex. G (ECF No. 16-7). The state district court denied the petition. Petitioner appealed. The
 17 Nevada Supreme Court affirmed on July 23, 2013, and remittitur issued on December 17, 2013. Ex.
 18 O (ECF No. 16-15). This was a petition for other collateral review in state court that tolled the one-
 19 year period under 28 U.S.C. § 2244(d)(2) while it was pending.

20 The one-year period expired on September 29, 2014, taking into account the tolling while
 21 the first state habeas corpus petition and the motion for sentencing modification were pending.

22 Petitioner has pursued other petitions that do not affect the one-year period. The petition in
 23 Voss I was mailed to the court on February 28, 2011, but federal habeas corpus petitions do not
 24 qualify for tolling under 28 U.S.C. § 2244(d)(2). Walker, 533 U.S. at 181-82. Petitioner filed a
 25

26 ²A corrected amended judgment of conviction was entered on January 30, 2004. Voss I, Ex.
 27 148 (ECF No. 36-8). It removed a superfluous citation to the deadly-weapon enhancement statute,
 28 Nev. Rev. Stat. § 193.165, and it did nothing else. The corrected amendment judgment of
 conviction has no effect upon the timeliness of this action.

1 petition for a writ of mandamus in the Nevada Supreme Court on October 23, 2012, which was
 2 denied, and a notice in lieu of remittitur issued on December 13, 2012. Ex. K (ECF No. 16-11), Ex.
 3 L (ECF No. 16-12). Even if the mandamus petition was eligible for tolling, it was pending while
 4 the sentence-modification was pending, and thus the one-year period already was tolled. Petitioner
 5 has pursued other post-conviction habeas corpus petitions in the state courts, but all have been ruled
 6 to be untimely under Nev. Rev. Stat. § 34.726(1), and they are ineligible for tolling. Pace, 544 U.S.
 7 at 417.

8 The court received petitioner's original petition (ECF No. 5) on March 27, 2015. The court
 9 directed petitioner to file an amended petition. Petitioner mailed the amended petition (ECF No. 12)
 10 on July 16, 2015. Both are untimely under 28 U.S.C. § 2244(d)(1)(A).

11 Petitioner argues, both in his opposition (ECF No. 17) and in a request for judicial notice
 12 filed recently (ECF No. 25), that a state-created impediment has prevented him from pursuing
 13 ground 2 of the amended petition until recently, and thus the one-year period should not have started
 14 until that impediment was removed. See 28 U.S.C. § 2244(d)(1)(B). The court disagrees.
 15 Petitioner has been able to litigate, and has been litigating, ever since his judgment of conviction
 16 became final in 2000. This includes the federal habeas corpus petition in Voss I. Petitioner also has
 17 challenged the judgment of conviction in a related criminal case out of the Second Judicial District,
 18 CR96-1581, in both state court and federal court, and he has pursued other civil actions in this court.
 19 The state has not impeded petitioner from filing anything in either state court or federal court.

20 Petitioner's argument is that the state courts treated a ground similar to ground 2 incorrectly
 21 in the first state-habeas corpus petition, and that only recently have the state courts recognized the
 22 error. This is not an argument that a state-created impediment prevented petitioner from filing a
 23 federal habeas corpus petition, despite petitioner styling it as such. Effectively, it is an argument for
 24 equitable tolling with respect to ground 2, and only ground 2, but the court still is not persuaded.

25 Ground 2 contains two claims. First, petitioner argues that his convictions for first-degree
 26 murder and first-degree kidnaping violate the Double Jeopardy Clause of the Fifth Amendment
 27 because, prior to being charged with those crimes, a judge in another case imposed a harsh sentence
 28 for other crimes based upon a suspicion that petitioner had committed them. Second, petitioner

1 argues that trial counsel provided ineffective assistance because counsel did not move to dismiss the
2 charges based upon the double-jeopardy violation.

3 Petitioner has been convicted in two cases of the Second Judicial District Court involving
4 the same victim, Beverly Baxter. In CR96-1581, petitioner was convicted of burglary, forgery,
5 uttering a forged instrument, and attempted theft. Petitioner had tried to deposit a check from a
6 third party payable to Baxter into Baxter's bank account. The check was genuine, but petitioner had
7 forged Baxter's endorsement. Then petitioner had tried to present a check from Baxter payable to
8 petitioner to take most of the money from the first check. Baxter had written the second check but
9 left the payee line blank, and petitioner had forged his name onto the payee line. Baxter had
10 disappeared at this time. From the start of that case through at least entry of the judgment of
11 conviction, nobody but petitioner knew what had happened to Baxter. At sentencing in CR96-1581,
12 the judge stated that he believed that petitioner had killed Baxter, and the judge imposed
13 consecutive sentences amounting to 128 to 360 months in prison. Petitioner pursued a state post-
14 conviction habeas corpus petition, case number CR96P1581. On August 9, 2001, the state district
15 court determined that petitioner was entitled to a new sentencing hearing. Request for Judicial
16 Notice, Appendix 2 (ECF No. 25, at 19-20).

17 After petitioner was convicted in CR96-1581, Baxter's body was found. In CR97-2077,
18 petitioner was charged with crimes related to her death, ultimately leading to convictions for first-
19 degree murder (with the deadly-weapon enhancement removed on direct appeal) and first-degree
20 kidnaping. The sentences in CR97-2077 run concurrently with each other and with the sentences
21 imposed in CR96-1581. Voss I, Ex. 148 (ECF No. 36-8). Petitioner filed a post-conviction habeas
22 corpus petition in the state district court, case number CR97P2077, as described above. The state
23 district court appointed counsel.

24 Everything that the court now describes occurred after petitioner already had received relief
25 in CR96P1581. On January 31, 2003, counsel filed a supplemental petition. Ground 6 of that
26 supplement contained one of the claims now alleged in ground 2 of the current amended federal
27 petition. In the title of the ground, petitioner claimed that counsel should have moved to dismiss the
28 murder count and the kidnaping count based upon the sentence imposed in CR96-1581. The body

1 of the ground related some procedural history, but it did not contain any allegations regarding
2 ineffective assistance of counsel. Voss I, Ex. 93, at 22-23 (Voss I, ECF No. 30-13, at 23-24). The
3 state district court determined that supplemental state ground 6 was a claim of a double-jeopardy
4 violation, and that it was barred by Nev. Rev. Stat. § 34.810 because petitioner could have raised it
5 on direct appeal and did not show good cause to excuse the omission. Voss I, Ex. 208, at 11 (ECF
6 No. 40-10, at 12). On appeal from the denial of the petition, petitioner argued that the state district
7 court treated supplemental state ground 6 incorrectly, and that it should have been a claim of
8 ineffective assistance of counsel. Voss I, Ex. 222, at 29-33 (ECF No. 41-2, at 31-35).³ The Nevada
9 Supreme Court summarily affirmed the denial of the petition for the reasons given by the district
10 court. Voss I, Ex. 237 (ECF No. 41-18).

11 After the conclusion of the first post-conviction state habeas corpus petition, petitioner
12 commenced Voss I. The amended petition in Voss I had two grounds relevant to ground 2 in the
13 current amended petition. Ground 1(r) was the double-jeopardy claim itself. Ground 2(i) was the
14 claim that counsel provided ineffective-assistance for not moving to dismiss based upon the double-
15 jeopardy violation. Voss I, Amended Petition, at 3(A-E)-3(A-F), 5(f)-5(h) (ECF No. 10, at 33-34,
16 41-43). Respondents in Voss I filed a motion to dismiss that argued that ground 1(r). Voss I,
17 Motion to Dismiss, at 12-13 (ECF No. 25). Respondents in Voss I argued nothing regarding ground
18 2(i). The court agreed that ground 1(r) and other claims were not exhausted. Voss I, Order, at 2
19 (ECF No. 46).⁴ Petitioner elected to dismiss Voss I to return to state court.

Petitioner filed multiple petitions in the state courts after the dismissal of Voss I. What is relevant to the motion to dismiss is a decision of the Nevada Court of Appeals on appeal from the dismissal of a post-conviction habeas corpus petition as untimely. Petitioner argued that cause and prejudice existed to overcome the state-law procedural bars because in CR97P2077 the state district

³This was a proper-person brief. The Nevada Supreme Court allowed the withdrawal of counsel, and it stated that it would consider the proper-person brief. Voss I, Ex. 223 (ECF No. 41-4).

⁴Other grounds in Voss I also were not exhausted, but they are not relevant to the issue currently before the court.

1 court and the Nevada Supreme Court treated supplemental state ground 6 incorrectly. On June 21,
2 2016, the Nevada Court of Appeals first held that petitioner could have raised the issue on the
3 appeal from the denial of his first post-conviction habeas corpus petition, but that he did not. On
4 August 21, 2016, in denying rehearing and issuing a corrected order affirming the district court, the
5 Nevada Court of Appeals noted that petitioner in fact did make that argument on appeal from the
6 denial of his first post-conviction habeas corpus petition. The Nevada Supreme Court still held that
7 petitioner had failed to demonstrate cause and prejudice to overcome the state-law procedural bars.
8 Request for Judicial Notice, Appendix 1 (ECF No. 25, at 9-12).

9 Petitioner argues that if the court had ruled in Voss I that either ground 1(r) or ground 2(i)
10 were exhausted, then he would not have elected to return to the state court. Opposition, at 14 (ECF
11 No. 17, at 15). Petitioner also argues that the decision of the Nevada Court of Appeals has freed
12 him to litigate ground 2 in the current amended federal petition. Request for Judicial Notice, at 5-6
13 (ECF No. 25). However, what the decision of the Nevada Court of Appeals really demonstrates is
14 that the respondents in Voss I were correct in their evaluation of the grounds. Respondents in Voss
15 I argued, and the court ruled, that ground 1(r) of Voss I was unexhausted. That was correct because
16 at that time petitioner had not presented a double-jeopardy claim to the state courts. Respondents
17 did not make any argument regarding ground 2(i) of Voss I, and the court made no ruling regarding
18 ground 2(i) of Voss I. Even though the state courts did not rule upon state supplemental ground 6 as
19 alleged, petitioner fairly presented the claim to the state courts, and that was all that 28 U.S.C.
20 § 2254(b) required. The erroneous treatment of supplemental state ground 6 never did prevent
21 petitioner from litigating the same claim—ineffective assistance of counsel for not raising a double-
22 jeopardy objection—in this court. If petitioner wanted to dismiss the unexhausted claims in ground
23 1 of Voss I, he could have done so, and the case would have proceeded to the merits on the other
24 claims, including ground 2(i).

25 Petitioner has not demonstrated any extraordinary circumstances to warrant equitable tolling
26 for ground 2. Ground 1(r) of Voss I was not exhausted, and the court never would have reached its
27 merits unless petitioner exhausted the ground. Ground 2(i) of Voss I was exhausted, and the court
28 would have ruled on its merits if petitioner had chosen to proceed only on the exhausted claims.

1 Petitioner chose otherwise, and that was a choice that, by its very nature, was not beyond his
2 control.

3 In any event, petitioner's request for judicial notice (ECF No. 25) shows that the entire
4 argument is moot. In CR96P1581, he received relief on the sentence in the underlying criminal
5 action, before he presented supplemental state ground 6 in CR97P2077. Ever since that time, he has
6 been arguing in a challenge to the judgment in CR97-2077 a claim (1) that he needed to raise in a
7 challenge to the judgment in CR96-1581, (2) that he actually did raise in CR96P1581, and (3) for
8 which he had received relief. If the court were to rule that equitable tolling for ground 2 was
9 warranted—and ground 2 would be all that survived the motion to dismiss (ECF No. 15)—then the
10 court still would be obligated to dismiss the action because petitioner already has received the relief
11 to which he was entitled.

12 Reasonable jurists would not find the court's conclusion to be debatable or wrong, and the
13 court will not issue a certificate of appealability.

14 Petitioner has filed a motion for leave to file supplemental response (ECF No. 19). The
15 proposed supplemental response is not of any assistance in deciding the motion to dismiss, and the
16 court denied petitioner's motion.

17 Petitioner has filed a motion for leave of court to exceed page limits (ECF No. 22).
18 Petitioner wants to file an oversized motion for summary judgment. This motion and the proposed
19 motion for summary judgment are moot because the court is dismissing action for untimeliness.

20 IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 15) is
21 GRANTED. This action is **DISMISSED** with prejudice because it is untimely. The clerk of the
22 court shall enter judgment accordingly and close this action.

23 IT IS FURTHER ORDERED that petitioner's motion for leave to file supplemental response
24 (ECF No. 19) is **DENIED**.

25 IT IS FURTHER ORDERED that petitioner's motion for leave of court to exceed page
26 limits (ECF No. 22) is **DENIED** as moot.

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1 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.
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4 DATED: September 21, 2016.
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9 HOWARD D. MCKIBBEN
10 United States District Judge
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